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No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute that securing a prompt and authoritative construction of Chapter 154's compliance criteria is a matter of great importance to virtually every capital jurisdiction and death-sentenced prisoner in the Nation. Nor does respondent identify any reason why this is not an appropriate case in which to supply the necessary guidance. Instead, respondent opposes review primarily on the ground that the Ninth Circuit's decision is correct. For reasons stated below and in the petition, respondent's defense of the court's decision is wholly unpersuasive. But even if the nature and extent of the Ninth Circuit's errors were less clear, review would be warranted to ensure that state and federal habeas processes alike may be expeditiously reformed and improved nationwide in accordance with Congress's design for "ensuring fairness and protecting the constitutional rights of capital litigants." Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report (Aug. 23, 1989), 135 Cong. Rec. at S13482.

1. a. The issue of greatest and most immediate national importance presented by this case concerns the proper construction of 28 U.S.C. §§ 2261(b) and 2265(a), wherein Congress encouraged states authorizing capital punishment to provide "standards of competency for the appointment of [collateral] counsel" by rule of court or statute. See Pet. App. 79a, 81a. By insisting that qualifying state standards must be "binding and mandatory," respondent argues that he is only reading the provisions of Chapter 154 "to mean what they say." Br. in Opp. 7. The first problem with this submission, of course, is that Chapter 154 says nothing about state standards being "binding and mandatory."[1/] Even the Ninth Circuit recognized as much, characterizing this additional "requirement" as something Congress "implicitly included." Such an "implication," in turn, rests on the assumption that Congress feared state standards would be "eviscerated" if their application was "left to the discretion of a [state] court" and federal courts would then be required to undertake "a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154." Pet. App. 17a-18a. As we explained in the petition, this train of reasoning is flawed from premises to conclusion, and

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1. Respondent also offers a defense of the Ninth Circuit's view that in order to "provide" standards, the state's rule or statute must "itself contain[]" the standards (rather than authorize or direct their promulgation in some other valid instrument of state law). Br. in Opp. 14-15. As we explained in the petition, however, because California's standards *are* "contained in" Section 20 of the Standards of Judicial Administration and the Section 20 standards *have* been adopted as a rule by the California Supreme Court pursuant to California Government Code section 68070, it is unnecessary to consider whether those same standards were "provided" by Government Code section 68511.5 (directing the promulgation of rules regulating the appointment of counsel and establishing procedures therefor, with consideration for *inter alia* "the need to match the skills and experience of the attorney with the demands of the case," Pet. App. 83a) and California Rule of Court 76.5 (adopted eff. Jan. 1, 1985) (requiring the establishment of counsel appointment lists with explicit reference to the Section 20 guidelines (also adopted eff. Jan. 1, 1985), Pet. App. 84a, 86a); see State C.A. Br. Adden. 11, 14. Accordingly, we explicitly have not sought review of that question. Pet. 27-28 nn. 12-13.

even respondent makes little effort to defend it on its own terms. Instead, he denies that the Ninth Circuit's construction of Chapter 154 imposes any "rigid conditions" on the form and operation of state competency standards. Qualifying standards, he assures this Court, need be "mandatory" only in the sense that they must not be "hortatory." Under this proposed reading, qualifying states may inform their application of counsel standards with discretionary considerations, just so long as, ultimately, the states are "obligated to comply" with the standards; likewise, states may forge exceptions to, and authorize judicial departure from, their standards, but state courts cannot be left "free to disregard" them. Br. in Opp. 8-9, 21.

The distinctions petitioner hopes to ascribe to the Ninth Circuit find little expression of support in the decision of that court. See, *e.g.*, Pet. App. 17a ("The requirement of competent counsel . . . would be eviscerated if the decision to follow the standards were left to the discretion of a court"). In all events, the distinctions themselves will prove utterly useless to any state that attempts to achieve compliance, as well as to any court that is called upon to resolve the question. Indeed, the purported distinctions are wholly illusory, as an examination of relevant provisions of state and federal law immediately reveals: 21 U.S.C. § 848(q)(7), for example, leaves federal courts "free to disregard" the competency standards for capital counsel prescribed in section 848(q)(6), yet not even respondent suggests that federal law "fails to provide" standards. See Pet. App. 95a-96a. Although these and similarly instructive provisions of federal law were identified and discussed in our petition, respondent altogether ignores them in his opposition. Similarly, he refuses to acknowledge that the American Bar Association's recommended competency standards—some adaptation of which now serves as the statutory model for the majority of states seeking to achieve Chapter 154 compliance, see Pet. App. 96a-172a—also permit appointment of counsel who fail to meet the standards specified so long as "it is clearly established to the appointing authority that competent represen-

tation will be provided." Pet. App. 116a, 125a-126a. Thus, there is nothing "hyperbolic" (Br. in Opp. 9) about our observation that the Ninth Circuit's construction of Chapter 154 severely undermines any prospect that the quid pro quo envisioned by Congress will be honored in Kansas, Idaho, Oregon, New York, Washington, Arizona, Mississippi, Maryland, Nevada, Ohio, South Carolina, Arkansas, and California. Respondent's complete refusal to address the nationwide implications of the Ninth Circuit's construction of Chapter 154 places the breadth and gravity of that court's misanalysis beyond serious dispute.

Respondent's suggestion (Br. in Opp. 9) that the Ninth Circuit's reading of Chapter 154 comports with the Fifth Circuit's in *Mata v. Johnson*, 99 F.3d 1261 (1966), *vacated in part on other grounds*, 105 F.3d 209 (1997), is unavailing. *Mata* stands for the unremarkable proposition that qualifying state standards must be "explicit" and have "the force of [state] law." In no manner does it support the conclusion that they must also be "binding and mandatory" in the peculiar sense conceived by the Ninth Circuit. Texas had *no written standards whatsoever*, and thus failed to qualify. California's standards, by contrast, are nothing if not "explicit"—they are set forth in Section 20. And whether Section 20 enjoys the "force of law" (i.e., whether it is "mandatory" in the sense that the Fifth Circuit used that term) is the precise question of state law that respondent has so studiously resisted, and the Ninth Circuit has twice refused, certification to the California Supreme Court.

Respondent's own Brief in Opposition demonstrates that the Section 20 standards' status as "rules" under California law is an issue at the center of this dispute. In service of his desire not to have that question addressed by the only tribunal capable of doing so authoritatively, respondent tells this Court three times that petitioner "has conceded that section 20 is a 'mere recommendation rather than a statute or a rule of court.'" Br. in Opp. 20; *id.* at 8, 29. Elsewhere, he argues that the Section 20 Standards' character as rules under state law "is irrelevant"

because possessing that status would not qualify them "as 'rules' *for purposes of Chapter 154.*" *Id.* at 28 (emphasis added).

Petitioner, of course, never issued the concession respondent attributes to her, and such a concession would be directly contrary to the position petitioner has consistently held and expressed throughout these proceedings. See Record, Doc. No. 236 (State's Supp. Mem. re Applicability of Chapter 154) at 16-17 ("[T]he [Section 20] standards themselves, while originally presented as 'recommendations,' *have been adopted by the California Supreme Court as 'rules'* relating to that Court's internal operation and governance" (emphasis added) (citing Cal. Gov't Code § 68070)). Nor, contrary to respondent's statements made in opposition to this petition (Br. in Opp. 20), did the Ninth Circuit ever credit petitioner with making such a concession. Compare Pet. App. 39a-40a (circuit court decision) ("The State contends that section 20 is a rule of court . . . ." and "The State . . . claims that section 20 has become . . . a rule of court . . . because it has been adopted by the California Supreme Court . . . .") with Pet. App. 76a (district court opinion) (citing Record, Doc. No. 236, at 16-17 (quoted in relevant part, *supra*)).

The notion that a provision could constitute a "rule" of the California Supreme Court as a matter of *California* law yet somehow fail to be a "rule of [California's] court of last resort" "for purposes of Chapter 154" is nonsensical.

b. Respondent does not directly dispute our observation that all death-sentenced prisoners in California enjoy a state-law right to collateral counsel, and he appears to concede that creation of such a guarantee by rule or statute will suffice to demonstrate that a state has "established [an appointment] mechanism" within the contemplation of Chapter 154. See Br. in Opp. 15; accord, State C.A. Br. 44 ("[E]stablishment' of a state's mechanism [must be] accomplished by rule or statute"). He maintains, however, that this right "did not exist" in California until the enactment of California Government Code section 68661 *et seq.* in 1998, an event that, respondent infers,

"necessarily demonstrate[s]" the fact of California's previous noncompliance. Br. in Opp. 14, 15, 17-18.)

In truth, the right under California law to collateral representation in capital cases was created over thirty years ago, and its several sources are described—authoritatively—in *In re Sanders*, 21 Cal. 4th 697, 719 (1999): "(i) *In re Anderson*, 69 Cal.2d 613 [1969], (ii) [the California Supreme Court's] own Internal Operating Practices, (iii) policy 3 of the Supreme Court Policies [Regarding Cases Arising From Judgments of Death, effective 1989], and now (iv) Government Code section 68662 *all require*" the appointment of capital collateral counsel in capital cases. Without acknowledging this explicit and binding construction of state law, respondent seeks to undermine it by arguing that the California Death Penalty Policies (which, in 1989, accelerated the point at which the right to collateral counsel, created 20 years earlier, attaches) "are not . . . rules of court," and that they create an "irreconcilable conflict" with the IOPPs' authorization of collateral appointments "*after* the termination of the capital appeal," rather than *during* the pendency of the state's unitary review process. Br. in Opp. 18-19 (emphasis by respondent). Obviously, however, a provision of state law that affirmatively authorizes appointments after appeal does not "withhold" appointments at any other time (Br. in Opp. 20), and most especially does not do so at a stage of state proceedings during which state law otherwise explicitly ensures that representation *is provided*. Moreover, while respondent claims to be certain that the Policies are not "rules" of the California Supreme Court, he (like the Ninth Circuit) refuses to confront the most probative evidence available on the point: the fact that the California Supreme Court has explicitly referred to the Policies *as rules* no fewer than fourteen times. *Sanders*, 21 Cal. 4th at 704, 706, 707-711, 713, 716-721, 723. Similarly, he ignores Chapter 154's legislative history, which unambiguously shows that Congress *itself* regarded the California's Death Penalty Policies as a "rule of its supreme court." 137 Cong. Rec. S3221 (Mar. 31, 1991). The Policies' status as rules, of course,

is yet another predicate question of state law bearing directly on California's compliance with Chapter 154.

Respondent's argument (Br. in Opp. 17-18) that California's implementation of certain state procedural reforms in 1998 "necessarily demonstrate[s] that, at least prior to February 27, 1998, California had not complied with the prerequisites for Chapter 154 benefits" lacks all basis in logic and historical fact. First of all, California's reforms were instituted primarily to address a long-standing concern relating to delays in *state* practice, a concern that substantially predates, and exists quite independent of, the state's interest in seeing *federal* proceedings progress more expeditiously by application of Chapter 154. Indeed, the principal reconfiguration of state procedure occasioned by the 1998 reforms resulted from careful long-term study initiated well before Congress's enactment of Chapter 154, and well before the now-reversed panel decision in *Ashmus v. Calderon*, 123 F.3d 199 (1997), *rev'd*, 523 U.S. 740 (1998). *See Hill v. Butterworth*, 941 F. Supp. 1129, 1159 attach. n. 16 (N.D. Fla. 1996) ("Shevin Report" (Feb. 26, 1996)) (citing information respecting *then*-contemplated state reforms provided by the Executive Director of the California Appellate Project), *rev'd*, 147 F.3d 1333 (11th Cir. 1998). Of course, with reform, not regression, being the California legislature's overarching objective, it naturally avoided any changes in the law that would take the state *out* of compliance with Chapter 154. The exacting care with which that objective was fulfilled does not "demonstrate" earlier noncompliance.

To be sure, the 1997 panel decision declaring California noncompliant did shape some elements of the state's subsequent reform package, among them the legislature's directive that competency standards for collateral counsel be made "binding and mandatory," and that they be adopted by "the Judicial Council," not just by the California Supreme Court. See generally 123 F.3d at 1208 (erroneously characterizing Section 20 as "not a 'rule of court,'" and incorrectly assuming that the only "rules of court" under California law are those promulgated by the State Judicial Council); compare Cal. Gov't

Code § 68070 (authorizing *every* state court to makes *its own* rules, Pet. App. 94a). But with California's death row population burgeoning and there then being no assurance that the state's certiorari petition would be granted and the panel's decision reversed and ultimately vacated, California could scarcely risk ignoring what was (for then, at least) circuit law. Thus, the only thing "necessarily demonstrated" by the state's swift and prudent response was its awareness that the Ninth Circuit had issued an adverse *ruling*. Whether that ruling was *correct* remained an entirely different question, yet the state, at that point, had little choice but to effect at least one hyper-formalistic "change [in] existing law." See Br. in Opp. 18. By conforming to a judicial ruling, of course, a party does not prove its validity. Suggesting otherwise is sheer bootstrapping.

2. Finally, respondent tenders a protracted defense of the Ninth Circuit's refusal to certify any of the state law questions on which it issued mispronouncements. Br. in Opp. 22-32. Because the substance of the Ninth Circuit's most significant state law errors has been addressed previously with sufficient particularity, that subject merits no further discussion at this juncture. Indeed, because many of those errors are to varying degrees simply by-products of the court's misreading of Chapter 154 itself, see Pet. 26-27 nn. 11-13, some likely will never need to be addressed at all: If the Ninth Circuit's errors of federal statutory construction are corrected by this Court, we doubt the panel will again fail, on remand, to secure the California Supreme Court's guidance on any then-remaining disputed state-law questions.

Respondent otherwise resists certification on the ground that "interpretation of a federal statute, such as Chapter 154, presents a *federal* question properly decided by federal courts." Br. in Opp. 24 (emphasis by respondent). If the presentation of a "federal question"—hardly a novel attribute of the majority of cases landing in federal court—made certification of every predicate state-law question "unwarranted" or "inappropriate" (Br. in Opp. 25), one would be hard-pressed to identify any case in which certification might be deemed proper. Under the

express terms of Chapter 154, state compliance turns on the state of the state's *own* law—i.e., on the procedural attributes of a particular "mechanism" *created under state law*. It is therefore an inescapable fact (already demonstrated with regrettable frequency by the Ninth Circuit) that misapprehensions of pertinent state law will defeat correct resolution of the issue presented in this proceeding. See *In re Robbins*, 18 Cal. 4th 770, 793 n. 14 ("Contrary to the Ninth Circuit Court of Appeals' reading of [California law] in *Ashmus v. Calderon, supra,* 123 F.3d 1199, [*In re Clark,* 5 Cal.4th 750] does not limit counsel's duty to investigate—nor does it limit the availability of habeas corpus investigation funds—to 'claims that are discoverable by reference to the four corners of the appellate record' or claims that are 'revealed by the record'"); see also Pet. App. 33a ("From 1989 to 1998, . . . California's appointment mechanism was established only in its 1989 Supreme Court Policies and Rule XIII . . . of the IOPPs . . . of the Supreme Court of California"); see generally 123 F.3d at 1208 (failing to consider the rulemaking authority provided by Cal. Gov't Code 68070). Under these circumstances, continuing resistance to certification is especially misguided.

Respondent also submits that certification is unwarranted because the "cause pending" is the habeas attack he initiated in the district court and "questions . . . which relate[] to the Chapter 154 issue" will not "resolve[] the claims of federal constitutional violations raised" in that "underlying" challenge. Br. in Opp. 11, 27. Respondent, however, has appropriately *stipulated* that resolving "the Chapter 154 issue" "may materially advance the ultimate termination" of his habeas proceedings. Record, Doc. No. 254. Had that not been true, there would have been no basis for presenting "the Chapter 154 issue" to the Ninth Circuit in an interlocutory appeal—which is, in all events, the only "cause pending" in which certification was sought.

Finally, respondent resists certification by arguing (Br. in Opp. 29-30) that "regardless of whether" the Section 20 standards were adopted as rules, his state counsel "'never

received any orders to investigate collateral claims.'" "Accordingly," he claims, petitioner "cannot show that counsel was appointed, under any standards, to represent Mr. Ashmus in habeas corpus proceedings at any time from the appointment of direct appeal counsel in 1987 until the state court affirmed Mr. Ashmus' death sentence on direct appeal in 1991." He further suggests that his counsel were therefore "confus[ed]" about whether they had any duty to provide collateral representation. The record, however, plainly shows that the California Supreme Court ordered the appointment of respondent's counsel in 1987; the scope of that ordered appointment was extended to collateral representation by operation of state law in 1989; and in 1990—*during* the pendency of respondent's unitary proceedings—counsel explicitly *acknowledged* their duty to provide respondent with collateral representation, and sought an "extension of time" within which "to file a petition for writ of habeas corpus." State's C.A. Add'l Excerpt of Rec. 4-5. Neither "confusion" nor failure of appointment can explain counsels' failure to pursue collateral relief in the California Supreme Court, and nothing in the history of respondent's state proceedings will justify his resistance to certification of those distinctly state-law questions that underlie the compliance inquiry.

* * * * *

The petition for writ of certiorari should be granted.

Respectfully submitted.

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